Supreme Court, U.S.
FILED

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No.

in the

Supreme Court

of the

United States

Term

CARL STEVEN LEWIS

Petitioner,

vs.

ANTHONY BRIGANO

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

ON COLLATERAL REVIEW CAN A FEDERAL HABEAS CORPUS COURT ANALYZE A CONSTITUTIONAL ERROR FOR HARMLESS ERROR UNDER THE *BRECHT* STANDARD WHEN STATE COURTS DID NOT REVIEW FOR HARM BECAUSE THEY FOUND NO ERROR?

II.

WHETHER IT WAS PROPER FOR FEDERAL REVIEWING COURTS TO REVIEW A STATE CASE FOR CONSTITUTIONAL ERROR WITHOUT EITHER A REVIEW OF THE TRIAL TRANSCRIPT WHERE THE ERROR WAS COMMITTED OR CONDUCTING AN INDEPENDENT EVIDENTIARY HEARING?

III.

WHETHER THE COURT OF APPEALS CORRECTLY ANALYZED THE CONFRONTATIONAL CLAUSE ERROR AS HARMLESS UNDER THE *BRECHT* STANDARD OF SUBSTANTIAL AND INJURIOUS EFFECT?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Carl Steven Lewis, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on April 8, 1994 and Petition for Rehearing denied May 25, 1994.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit entered on April 8, 1994, under the caption Lewis v. Brigano, was not printed due to Sixth Circuit Rule 24. That determination is attached hereto in Appendix 1. Petition for rehearing was denied on May 25, 1994 (Appendix 3).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 8, 1994. A petition for rehearing was sought and denied May 25, 1994. This petition for a writ of certiorari has been filed and docketed within the time prescribed. The jurisdiction of this Court is invoked under 28 U.S.C. § 2254 and Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: *to be confronted with witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

This provision is applicable to the states through the Fourteenth Amendment.

STATEMENT OF THE CASE

On February 27, 1989, Carl Steven Lewis, Petitioner, was indicted in the County of Coshocton Court of Common Pleas on six counts of complicity as follows: 1) aggravated murder with an aggravated robbery specification; 2) trafficking in marijuana; 3) unlawful possession of a dangerous ordnance; 4) grand theft; 5) aggravated robbery with a firearm specification; and 6) gross abuse of a corpse. With consent of counsel, the trial court dismissed the charge for trafficking in marijuana. On December 12, 1989, a jury

found Petitioner guilty on the remaining counts of the indictment.

On January 17, 1990 the court sentenced Petitioner to life imprisonment for the aggravated murder; eight to twenty-five years for the aggravated robbery; and three years on the firearm specification. The sentences for the dangerous ordnance and grand theft convictions were merged with the aggravated robbery, and Petitioner was sentenced to a definite term of one year imprisonment for gross abuse of a corpse. The trial court further ordered that all sentences were to be served consecutively.

On August 15, 1990, Petitioner, represented by counsel, appealed his conviction to the Court of Appeals for the Fifth District of Ohio, raising the following assignments of error:

1. The trial court committed prejudicial error when it ruled that declarations made by co-defendant Sandra Griffin to third party witnesses where [sic] admissible evidence.

2. The trial court abused its discretion when it indiscriminately admitted certain declarations against interest while denying the admission of other such statements.

3. "The essential demands of fairness" as embodied in the due process clause of the Fourteenth Amendment to the United State's Constitution and Article I, Section 10 of the Ohio Constitution were violated when defendant's request to have the trial court compel Tex and Kim Zimmerman to answer questions on cross examination was denied.

4. The trial court erred prejudicially [sic] when it failed to completely and correctly instruct the jury on the crime of complicity.

5. The trial court erred prejudicially when it denied the inclusion of licensed drivers in the jury list utilized to select the venire of this case.

6. The trial court erred when it denied the admission of the results of defendant's voluntarily taken polygraph because the results of such an examination are of such a relevant and probative value that based upon the establishment of a proper foundation they are admissible evidence.

7. The state failed to prove beyond a reasonable doubt the necessary element of prior calculation and design, or the cocommitant [sic] existence of an aggravated robbery.

8. Defendant's conviction of aggravated robbery with a firearm specification is contrary to the law.

9. The trial court erred prejudicially when it refused to instruct the jury on the inferior degree offense of abuse of a corpse.

On February 13, 1991, the court affirmed Petitioner's conviction. Petitioner, then sought leave to appeal to the Supreme Court of Ohio. On April 16, 1991 the Ohio Supreme Court denied Petitioner's request for an extension of time to file a memorandum in support of jurisdiction. On June 21, 1991, the Ohio Supreme Court sua sponte dismissed the action for lack of prosecution. On December 9, 1991, Petitioner filed a delayed memorandum in support of jurisdiction before the Supreme Court of Ohio, asserting essentially the same nine propositions of law previous asserted through counsel to the Fifth District of Ohio Court of Appeals. On January 22, 1992, the Ohio Supreme Court granted Petitioner's motion for leave to file a delayed appeal. On April 15, 1992, the Supreme Court of Ohio dismissed Petitioner's appeal for want of a substantial constitutional question.

On July 21, 1992, Petitioner, proceeding pro se,

pursuant to 28 U.S.C. § 2254, filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Ohio, asserting the following grounds for relief:

> Ground One: Court illegally ruled that co-defendant's statements were admissible.
>
> Supporting Facts: Prosecutor used several witnesses to establish what the missing co-defendant was supposed to have said concerning the defendant's activities.
>
> Ground Two: Court improperly ruled other such statements were not admissible.
>
> Ground Three: Court improperly allowed the state's witness to take the fifth, after testifying.
>
> Supporting Facts: The Court granted the witness [sic] fifth Amendnent [sic] right on cross examination to prevent defendant form being able to show bics [sic] through deals and their bad act's [sic].
>
> Ground Four: Court erred when it failed to properly instruct on complicity.
>
> Supporting Facts: Defendant request that his mere presence at scene of th [sic] crime did not constitute complicity where such arguement [sic] and request was based upon spur of the moment.
>
> Ground Five: The trial court committed prejudicial error when it refused to utilize lecensed [sic] drivers for jury duty in this case once requested.
>
> Ground Six: The State of Ohio failed to prove that the

petitioner had possession of a firearm.

Ground Seven: The failure of the respondent to prove beyond a reasonable doubt the element of prior calculation and design deprived petitioner of due process of law and a fair trial.

Ground Eight: The State of Ohio failed to prove that the petitioner had possession of a firearm.

Ground Nine: The trial court committed prejudical [sic] error when it refused to instruct the jury on a lesser degree offense of abuse of a corpse.

The District Court, on May 19, 1993, dismissed Petitioner's petition by opinion and order, holding that "Griffin's out-of-court declaration did not deprive petitioner of his right to confront witnesses against him." (Appendix 2).

Petitioner then appealed the District Court's order to the Sixth Circuit Court of Appeals raising six of the nine issues raised at the District Court level. On April 8, 1994, the Court Appeals in a per curiam decision found that constitutional error had occurred at trial under *Bruton v. United States*, (391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1967)), when out of court statements made by Petitioner's co-defendant were admitted into evidence through a third party in violation of the Petitioner's Sixth Amendment confrontation rights when

the co-defendant did not take the stand at trial. (Appendix 1). However, the court went on to conclude that the error was harmless under the more stringent standard for harmless error analysis recently announced by The United States Supreme Court in *Brecht v. Abrahamson*. --- U.S. ----, 113 S.Ct 1710, 123 L.Ed.2d 353 (1993). (Appendix 1 p. 7 - 8).

On May 25, 1994 the Sixth Circuit Court of Appeals denied Petitioner's petition for rehearing en banc. (Appendix 3). Subsequently Petitioner petitions this Court for writ of certiorari to resolve substantial and important questions of law.

REASONS FOR GRANTING THE WRIT

There are several reasons that the Sixth Circuit's position on these issues are untenable. Since the United States Supreme Court altered the standard of review for most federal habeas corpus review cases, the Circuits have disagreed as to the reach of its holding. The Eighth Circuit has consistently concluded that due to explicit reasoning of finality, avoidance of duplicate analysis, and capable state

courts that were present in The Court's holding in *Brecht*, that *Brecht* was not meant to apply to all cases reviewed on federal habeas corpus motions. Rather, the explicit reasoning of *Brecht* demands that close attention be paid to the issues and holdings courts directly reviewing the case determined to be present. However, the Sixth Circuit ignored the reasoning present in *Brecht* and determined that the more stringent harmless error standard applied to all federal habeas review cases. These Sister Circuits are in direct conflict with each other in their analyzation and application of the holding of *Brecht* which demands clarification by The Court.

There are several reasons that the Sixth Circuit's position on this issue is untenable. First, the proper harmless error standard for review of constitutional errors committed at trial but which were not pronounced so until federal appellate review is whether the error was harmless beyond a reasonable doubt. Second, it was improper for the federal reviewing courts to review Petitioner's case for constitutional error without the benefit of either a review of the trial transcript to determine if an error had been committed and its effect or by

conducting an independent evidentiary hearing on the issue. Finally, even if the error was reviewed under *Brecht's* more stringent standard of substantial and injurious effect, the Sixth Circuit erroneously applied the standard to find harmless error.

I. The proper harmless error standard to be applied to constitutional errors committed at trial which went unrecognized until the Circuit court on collateral review is the *Chapman* standard of harmless beyond a reasonable doubt.

First, when a violation of a constitutional right reaches a federal habeas corpus review court unrecognized and unanalyzed as an error, the proper standard to apply to determine if the constitutional error was harmless is the *Chapman* analysis of harmless beyond a reasonable doubt.

When reviewing a constitutional violation for harmless error, courts traditionally required "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). However, in *Brecht v. Abrahamson*, The United States Supreme Court recently

altered this standard by readopting a proposition proposed in *Kotteakos v. United States* (328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed.2d 1557 (1946)). --- U.S. ----, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). The Court in *Brecht*, held that in most habeas corpus cases, the correct harmless error standard is a more stringent analysis for a petitioner to meet. A reviewing court must determine whether the constitutional error "had a substantial and injurious effect or influence in determining the jury's verdict." *Id.* --- U.S., at ----, 113 S.Ct., at 1722.

In *Brecht*, the Supreme Court noted that to apply the *Chapman* standard to a case being reviewed under federal habeas corpus review where a state court had already reviewed for harm would undermine "the finality of convictions that have survived direct review within the state court system." --- U.S. at ----, 113 S.Ct. at 1720 (citations omitted). The Court reasoned that "[s]tate courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*," and that "it scarcely seem[ed] logical to require federal habeas courts to engage in the identical approach to harmless-error

review that *Chapman* requires state courts to engage in on direct review." *Id.* at ----, 113 S.Ct. at 1721. The Court concluded that the costs of duplicate evaluation of harmless error analysis under the *Chapman* standard on federal habeas review outweighed the benefit of a deterrent effect derived form its application on collateral review. *Id.*

However, *Brecht's* procedural posture, which was of grave importance in the Supreme Court's reasoning, is quite different than the procedural posture present in Petitioner's case. *Brecht* reached The Supreme Court after two state appellate courts, a federal district court, and a federal court of appeals had reviewed the constitutional error under the *Chapman* harmless error standard; whereas, in the present case, the Sixth Circuit was the first court to recognize the constitutional error and analyze it for harmless error. As a result, the need for preservation of finality and avoidance of duplicate analysis by reviewing courts that was ever present in *Brecht* is notably absent in Petitioner's case.

Since The Court's decision in *Brecht*, the Eighth Circuit Court of Appeals has had several opportunities to limit the

breadth of *Brecht's* application to federal habeas corpus review cases which do not carry such a vast procedural history of review of harmlessness. Initially in *Hoversten v. Iowa*, the question presented on federal habeas review was whether the confrontation clause violation in allowing a child victim to testify behind a one-way mirror was harmless error. 998 F.2d 614 (8th Cir. 1993). In that case, the state courts had never considered the harmless error because they had previously found that no error had occurred. *Id.* at 615. Prior to The Supreme Court's decision in *Brecht*, the District Court had recognized and analyzed the error under the *Chapman* standard and concluded that the error was not harmless beyond a reasonable doubt. *Id.* at 617. As a result of this procedural posture, the question of *Brecht's* breadth of harmless error on federal habeas review was before the court. However, the Eighth Circuit declined to answer the question of which harmless error standard applied when state courts had found no error and therefore had not reached the issue of harmless error. *Id.*

In *Orndorff v. Lockhart*, the Eighth Circuit was faced

with the issue previously left unresolved by the *Hoversten* court. 998 F.2d 1426 (8th Cir. 1993), *US app pnd'g*. The question of which standard applied when state courts did not have the opportunity to review the error. *Id.* The court analyzed *Brecht's* reasoning of finality and duplicity and determined that the "*Brecht* rule was based largely on the notion that because the state courts can properly apply the *Chapman* harmless error standard on direct review, the federal habeas courts need only review those decisions under the *Kotteakos* harmless error standard", a more demanding standard for petitioner's to meet reiterated by *Brecht*. *Id.* at 1430. The court found that *Brecht's* reasoning was inapplicable to cases in which state courts did not have the opportunity to review for error. *Id.* Therefore, the court concluded that the proper harmless error standard of review to be performed by a federal habeas court which was the first to review the constitutional error was the *Chapman* standard of harmless beyond a reasonable doubt. *Id.*

In *Starr v. Lockhart*, the Eighth Circuit once again faced with a determination of *Brecht's* breadth. 23 F.3d 1280

(8th Cir. 1994). In *Starr*, the question was "which standard of review is appropriate if the state courts had the opportunity to address the constitutional error under the *Chapman* standard but did not do so because they found that there was no error." *Id.* at 1292. The court concluded that the reasoning in *Orndorff* applied equally to Starr's situation, in that "[c]onsidering an issue and finding no error does not carry with it an implicit *Chapman* analysis, and thus *Brecht* does not apply." *Id.*

In the instant case, the Sixth Circuit Court of Appeals was the first to recognize a *Bruton* error had occurred at Petitioner's trial and the first to analyze for harmless error. (Appendix 1). In its decision, the Sixth Circuit held that constitutional error resulted when co-defendant's statements were admitted into evidence in violation of the Petitioner's Sixth Amendment right to confront witnesses, in violation of *Bruton v. United States* (391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). (Appendix A, p. 7). However, in analyzing the error for harm, the court utilized the more stringent *Brecht* harmless error standard that is more

appropriate when a reviewing court is duplicating a state court's analysis.

Like the Eighth Circuit cases discussed above, the reasoning of duplicate analysis, capable state courts, and finality present in *Brecht* are not present in Petitioner's case. The Petitioner contends that the Sixth Circuit erred when it reviewed the newly recognized *Bruton* violation by the more stringent *Brecht* standard rather than using the *Chapman* standard. Since the Sixth Circuit was the first court to recognize that a constitutional error occurred at trial, the *Chapman* standard had not previously been applied in analyzing for harm. Therefore, the proper standard of review to apply to Petitioner's case on the initial review for harmless error, is the same standard that state courts would utilize when an error is first identified, *Chapman's* harmless beyond a reasonable doubt standard. The Petitioner further contends that when viewed under the *Chapman* standard, the *Bruton* error was not harmless beyond a reasonable doubt.

II. It was improper for the District Court and the Sixth Circuit to review Petitioner's case for constitutional error and harmless error without either a review of the trial transcript which was to be supplied by the Respondent, or by conducting an independent evidentiary hearing on the issue.

Second, the Petitioner contends that it was improper for the federal habeas courts to review for harmless error without a trial transcript from which to determine the true effect of the error and further that the district court was required to hold an evidentiary hearing because if proven true the alleged constitutional error entitled him to relief.

In considering a petition for a writ of habeas corpus, the district court is required to "make its determination as to the sufficiency of the state court findings from an independent review of the record, or otherwise grant a hearing and make its own findings on the merits." *Richmond v. Ricketts*, 774 F.2d 957 (9th Cir. 1985).

In Petitioner's case, the district court's order fails to reveal an independent review of the state court record. Specifically, the District Court conceded that the record which they based denial of habeas corpus upon, did not contain the

trial transcripts because the State failed to file the transcripts with the court as was promised in the State' return of writ to the district court. (Appendix 2, fn.1). Moreover, the record used by the Sixth Circuit in their decision of harmless error was duplicative of the deficient record the District Court utilized when finding no error had occurred.

In *Buenoano v. Singletary*, the Eleventh Circuit held that the district court failed to conduct a full evidentiary hearing on two claims of ineffective assistance of counsel that if proven true, established a right to relief. 963 F.2d 1433, 1438 (11th Cir. 1992). The court cited *Townsend v. Sain* (372 U.S. 293, 312-13, 83 S.Ct. 745, 757, 9 L.ED.2d. 770 (1963)) for the proposition that a federal court must hold an evidentiary hearing if the petitioner did not receive a full and fair hearing in state courts and if alleged facts if proven true establish a right to relief. *Id.* at 1438. In *Buenoano*, no evidentiary hearing was held in state post-conviction proceedings. *Id.* at 1436. The court concluded that although the district court held an evidentiary hearing it was a highly restrictive proceeding that was less than full and fair, and that

the Petitioner had alleged facts that if proven true established a right to relief and therefore remanded the case to the district court for the limited purpose of holding a full and fair evidentiary hearing. *Id.* at 1440.

In *Bowling v. Vose*, on federal habeas corpus review, the First Circuit found that constitutional error had occurred at petitioner's state trial when the petitioner was not allowed to present testimony of an alibi witness. 3 F.3d 559, 562 (1st Cir. 1993). The court went on to determine that they could not make a sufficiently appropriate determination of whether the error met the *Brecht* harmless error standard from the record before them and remanded so that the district court could hold such hearings as was necessary to determine the error's effect *Id.* at 563.

Petitioner contends that the Sixth Circuit erroneously determined that the *Bruton* error was harmless on the basis of two flaws with the record. First, the record before the Circuit court did not include a trial transcript, which would better enable a reviewing court to determine the injurious effect the co-defendant's out-of-court statements had on the

jury's determination of guilt. A transcript of a trial is undoubtedly an important and needed element of the record a federal habeas corpus court would need in order to determine the effect of an constitutional error that occurred at trial.

Secondly, because neither the post conviction state courts nor the District Court held evidentiary hearings, the district court did not have additional information and findings in the record that would enable a court to sufficiently review for harm of the constitutional dimension. As a result, Petitioner requests that the Sixth Circuit's finding of harmless error be vacated and the case remanded to the district court to review the transcript and to hold such hearings as is necessary to determine the effect of the *Bruton* error.

III. Even if viewed under a more stringent harmless error standard, the violation of Petitioner's constitutional right to confront witnesses was not harmless since the error had a substantial and injurious effect or influence in the jury's verdict.

Alternatively, if *Brecht* is read as applying a more stringent harmless error standard to all federal habeas corpus cases without regard for their procedural posture, the Sixth Circuit incorrectly characterized the error as harmless.

In *Jeffries v. Blodgett*, a federal habeas corpus case, the Ninth Circuit ordered the case remanded when it concluded that extrajudicial knowledge of the defendant's prior convictions resulted in possible harmful error even under the more stringent harmless error standard announced in *Brecht*. 5 F.3d 1180 (9th Cir. 1993). In utilizing *Brecht's* standard, the court recognized that "[a]lthough petitioners now face a greater burden, it would be wrong to assume the federal collateral review has lost much of its force." *Id.* at 1190. Furthermore, the court stated that it was

> "important in applying the new harmless error standard to abide by the cautionary words of the *Kotteakos* Court: 'The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction can not stand.' "

Id. at 1190 (*citing Kotteakos v. United States*, 328 U.S., at 765, 66 S.Ct., at 1248 (1946)).

In the Sixth Circuit's analysis for harmless error, the court determined that the out-of-court statement's probative value was minimal in comparison with the other evidence introduced. (Appendix 1, p. 8). When viewed in light of the cautionary words set out in *Kotteakos*, the Sixth Circuit erroneously analyzed the *Bruton* error by determining simply that there was other evidence to support the result. In order to determine that the error was harmless, the court should have determined that even with the presence of other evidence that "the error did not influence the jury" or that "the judgement was not substantially swayed by the error". *Kotteakos*, 328 U.S., at 764, 765, 66 S.Ct. at 1248. The Sixth Circuit engaged in no such analysis and therefore they erred in determining that the *Bruton* error was harmless.

In *Hoversten*, the Eighth Circuit denied to reach the question of the breadth of *Brecht* because it found the confrontation clause violation was not harmless under either the *Brecht* or *Chapman* standard. 998 F.2d 614. The court concluded that the remaining evidence was primarily hearsay testimony and that the error tainted the core of the

prosecution's case which did not enable the court to label it harmless. *Id.* at .

Furthermore, in *Shaw v. Collins*, after the state courts had viewed petitioner's case for constitutional error, the Fifth Circuit analyzed the error on federal habeas corpus review under the *Brecht* standard. 5 F.3d 128 (5th Cir. 1993). The Fifth Circuit held that violation of the defendant's confrontation clause rights was "far from harmless error" when videotaped testimony was substituted for the failure to call a child victim to the stand. *Id.* at 132. The court concluded that after a careful review of the record, the videotape had substantially and injuriously influenced the state trial court's finding of guilt because "the state's case was almost completely built upon [the] videotaped statements. Take away the videotape, and the State's case falls like a house of cards. All that remains is hearsay which could not have supported a finding that the defendant was guilty beyond a reasonable doubt." *Id.* at 133.

Petitioner's case is similar to this in that the out-of-court statement made by co-defendant, Sandra Griffin, was

the essential evidence in the case against the Petitioner because it served as the glue to bind inconsistent testimony from other witnesses. The co-defendant's statements regarding the Petitioner's role in the death of James Steurer, Sr. was introduced at trial through testimony by James Pullins. Additionally, on cross-examination Mr. Pullins admitted that when Griffin made this statement, she was under the influence of drugs. The remaining testimony regarding Petitioner's role consists of inconsistent testimony originating from two witnesses whose motives for testifying and truthfulness are seriously questionable. As a result co-defendant's statements were the Government's crucial evidence for conviction.

First, Petitioner's cell mate, Terry Wright, testified that Petitioner had told him of the plan and completion to kill the victim. However, on cross examination Wright's credibility was seriously questioned when Wright admitted that in past criminal investigations he readily lied about the criminal conduct of others in order to receive leniency. Therefore, Wright's conduct in the past does not lend itself to reliability

and truthfulness and as a result Petitioner's guilt should not hinge upon the testimony of Wright, a confessed liar.

Secondly, another co-defendant, James Steurer, Jr., testified as to Petitioner's ring leader role in the planning and completion of the murder while down playing his own role as a mere follower of orders. Steurer's testimony was similarly called into question through cross examination when his testimony was shown to be riddled with inconsistencies that did not match his prior statements.

Without co-defendant's statements the prosecution's case would have fallen apart and the jury could not have relied on the other witnesses' unreliable and inconsistent testimony to find guilt. Therefore, the error undoubtedly had a substantial and injurious effect or influence on the jury's verdict and the Sixth Circuit's decision should be vacated and remanded for determination under the correct standard.

CONCLUSION

The Sixth Circuit in the instant case being the first court to recognize that a constitutional violation had occurred at Petitioner's trial, incorrectly analyzed the Confrontation Clause error under the less stringent *Brecht* standard. This Circuit's decision to analyze for harmless error under the *Brecht* standard is in conflict with several consistent opinions written by the Eighth Circuit making the *Chapman* standard applicable to cases where the state courts had not reached the question of harmless error. The Court's reasons for utilization for a less stringent standard in that case are not applicable to this case since the Sixth Circuit is the first court to both recognize the error and analyze for harmless error. Therefore the correct standard to apply to the initial analysis for harmless error is the same standard that state courts would utilize on direct review of constitutional errors. As a result, the *Bruton* error was not harmless beyond a reasonable doubt and the court must vacate the Sixth Circuit's determination of harmless error and remand for a new trial.

Secondly, the federal habeas corpus review courts

improperly determined error and harm from a record that was missing a trial transcript and the District court did not hold an evidentiary hearing whose findings could have aided reviewing courts in their determination that the error was not harmless. Because the Petitioner alleged facts of a constitutional error which resulted in a unfair trial that if true established a right to relief, the District Court improperly failed to hold an evidentiary hearing on this issue.

Finally, the Sixth Circuit erroneously determined that the *Bruton* error at Petitioner's trial was harmless which directly conflicts the United States Supreme Courts decision in *Kotteakos*. The court disregarded important cautionary words set out by the *Kotteakos* court and simply determined that there was enough evidence to support the conviction. According to the *Kotteakos* court the Sixth Circuit should have determined that the error was not substantial or injurious.

CERTIFICATE OF GOOD FAITH

I hereby certify, as counsel for the Petitioner, Carl Steven Lewis, that the foregoing petition is filed in good faith and furthermore is not presented for delay of the Court.

_____

W. Gary Kohlman
Counsel for Petitioner

_____

Kevin M. Schad
Amicus Counsel

CERTIFICATE OF SERVICE

By our signatures affixed below, we, W. Gary Kohlman and Kevin M. Schad, hereby certify that a true and correct copy of the foregoing petition for writ of certiorari has been delivered to the office of the Attorney General of Ohio, 30 E. Broad Street, 26th Floor State Office Tower, Columbus, OH 43266-0410, on this the ____ day of August, 1994.

_____

W. Gary Kohlman
Counsel for Petitioner

_____

Kevin M. Schad
Amicus Counsel

APPENDIX

NO. 93-3659

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARL STEVEN LEWIS,

Petitioner-Appellant,

vs.

ANTHONY BRIGANO, WARDEN,

Respondent-Appellee.

On Appeal from the United States District Court for the Southern District of Ohio

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BEFORE KENNEDY, JONES, AND SUHRHEINRICH, Circuit Judges.

PER CURIAM. Petitioner Carl Steven Lewis appeals the District Court judgment denying his petition for writ of habeas corpus. Petitioner raises six issues on appeal including that the District Court erred by failing to grant his petition because the state trial court erroneously admitted out-of-court statements by a co-defendant who was unavailable because she refused to testify. For the reasons stated below, we affirm.

Appendix 1

I.

This case concerns the murder of James Steurer, Sr. ("James, Sr.") at his farm in Coshocton County, Ohio, where he grew marijuana. In 1987, James, Sr.'s daughter, Marilyn Steurer, and her friend Robin Peabody, introduced James, Sr. to a woman named Sandra Griffin. In 1987, James, Sr. invited Griffin to come and stay with him in Coshocton for a week in exchange for a pound of marijuana. At that time, Griffin, who was from Cleveland, Tennessee, was sexually involved with petitioner. Griffin and James, Sr. continued to see each other following the week-long visit. Griffin would come to Coshocton or he would travel to Cleveland. James, Sr. gave Griffin money and marijuana. She referred to James, Sr. as her "sugar daddy." During this time, Griffin was also still involved with petitioner who sold marijuana in Tennessee that came from the Coshocton farm.

In June, 1988, James Steurer, II

("James, II") moved to the Coshocton farm to live with his father, James, Sr. He participated in the marijuana operation, keeping machinery operating. By his own testimony, James, II hated his father. While staying at the farm, James, II met Griffin. He became friends with Griffin and petitioner, eventually moving to Tennessee to live with them. Griffin's relationship with James, Sr. deteriorated in 1988. He was angry with her over her drug use, and he hit her several times. She stated that she would kill him for hitting her. About the same time, Griffin and petitioner began to argue over relationship with James, Sr.

On January 3, 1989, Griffin, James, II and petitioner drove from Cleveland to Coshocton, arriving at the farm in the early morning hours of January 4th. In the morning while James, Sr. was in the barn feeding his animals, petitioner and James, II went down to the barn. When James, Sr. began t walk to the house, either James, II

or petitioner shot him in the head, killing him. James, II and petitioner then loaded the body on a tractor. They drove into the woods, where then laid the body on the ground. They put kindling wood on the body, then lit the fire. When the two men returned to the house, they helped Griffin load weapons into the car. They drove back to Tennessee. They buried some of the weapons and sold others. Petitioner and Griffin threw the murder weapon, a .357 Smith & Wesson, over a bridge. Cleveland, Tennessee police recovered the gun along the bank of a creek.

The day after the killing, several hunters came upon the burned area. They saw a rib cage which was still smoldering. They assumed it was part of an animal. Later in January, the Coshocton County Sheriff was notified of the disappearance of James, Sr. At the burn site, they recovered his skull, which showed signs of an injury by a blunt instrument. They also found vertebrae, part

of his left arm and left leg, teeth, and buttons. Steel toes from a pair of shoes were found pointed up, as if a body had been laying there. The body of James, Sr. was identified through dental records. The connection between the murder and petitioner was made through an informant in Tennessee, to whom Griffin had spoken about the Ohio murder.

On December 12, 1989, following a jury trial lasting more than twenty days, a jury in the Coshocton County Court of Common Pleas found petitioner guilty of complicity in the commission of the following offenses: 1) aggravated murder with an aggravated robbery specification; 2) unlawful possession of a dangerous ordnance; 3) grand theft; 4) aggravated robbery with a firearm specification; and 5) gross abuse of a corpse.[1] On January 17, 1990, the court

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[1]Petitioner was also indicted on a count of trafficking in marijuana. With consent of counsel, the trial court dismissed this count.

sentenced petitioner to life imprisonment for the aggravated murder; eight to twenty-five years for the aggravated robbery; and three years on the firearm specification. The sentences for the dangerous ordnance and grand theft convictions were merged with the aggravated robbery, and he was sentenced to a definite term of one year imprisonment for gross abuse of a corpse.

On August 15, 1990, petitioner, represented by counsel, appealed his conviction to the Court of Appeals for the Fifth District of Ohio. On February 13, 1991, the Court of Appeals affirmed petitioner's conviction. Petitioner, acting pro se, sought leave to appeal to the Supreme Court of Ohio. On June 21, 1991, the Ohio Supreme Court dismissed petitioner's appeal for lack of prosecution. On January 22, 1992, the Ohio Supreme Court granted petitioner's request to file a late appeal, which he did. On April 15, 1992, the Ohio Supreme Court dismissed

petitioner's appeal for want of a substantial constitutional question.

On July 21, 1992, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Ohio pursuant to 28 U.S.C. § 2254. The District Court, on May 19, 1993, dismissed petitioner's petition by opinion and order. On appeal, defendant raises six of nine issues argued before the District Court:

> 1. Petitioner's confrontation rights were violated when the trial court ruled that declarations made by co-defendant Sandra Griffin to third party witnesses were admissible evidence.
>
> 2. Petitioner was deprived of due process when the trial court arbitrarily excluded certain hearsay declarations against interest while admitting other such statements.
>
> 3. Petitioner was deprived of due process and the right to confrontation when the trial court refused to compel government witnesses to answer questions on cross-examination.
>
> 4. Petitioner was deprived of a fundamentally fair trial when the trial court failed to completely and correctly instruct the jury on the crime of complicity.

5. Petitioner's conviction of aggravated robbery with a firearm is inconsistent with his conviction of aggravated murder with a firearm.

6. The state failed to prove that petitioner murdered with prior calculation and design, or with an aggravated robbery.

II.

Petitioner argues that the state court erred in admitting testimony by several witnesses regarding statements made by co-defendant Griffin. Griffin invoked her Fifth Amendment right against self-incrimination, making herself an unavailable witness under Ohio Evid. R. 804 (A). The trial court admitted the following testimony.

Janice Steurer, daughter-in-law of the victim, testified that she overheard an argument between Griffin and James, Sr. She testified that Griffin thought it wasn't right that James, Sr. hadn't bought Christmas presents for family members. She further testified that she got the impression that things weren't going well

between Griffin and James, Sr. The state trial court and court of appeal held the first statement admissible because it was used to establish Griffin's state of mind. The testimony regarding Griffin and the victim's relationship was held admissible because if concerned a personal observation by the witness not a hearsay statement made by Griffin.

Robin Peabody, a friend of Griffin, testified that Griffin told her that Griffin was upset with James, Sr. for taking her Xanax pills away. The state court of appeal upheld the admission of the testimony on the grounds that it was offered to show Griffin's state of mind. The District Court agreed with the state courts' analysis of Janice Steurer's and Peabody's testimony and held that their admission did not deprive petitioner of a fundamentally fair trial.

Tracy Bruce, another friend of Griffin from Cleveland, Tennessee, testified to seeing James, Sr. strike Griffin twice.

Bruce further testified the Griffin told her that Griffin would kill James, Sr. if he hit her again. The state court of appeals held this testimony admissible because Griffin's statement was against her penal interest.

James Pullins, an acquaintance of Griffin, testified that on January 1, 1989, Griffin told him that she, James, II, Steve Lewis, and petitioner were going to "take care" of her "sugar daddy." He further testified that on January 8 or 9, 1989, four or five days after the murder, Griffin told him that she, petitioner, and James, II had shot her "sugar daddy." The state court of appeals held that the trial court had not abused its discretion in admitting Bruce's and Pullins' testimony as trustworthy declarations against penal interest. The District Court upheld the introduction of Pullins' and Bruce's testimony on the ground that there were sufficient indicia of reliability and, in any event, that their testimony was cumulative to other testimony

establishing Griffin's and petitioner's role in the offense.

The petitioner argues that his rights under the Confrontation Clause were violated and thus his claim is one of constitutional trial error. Our review on habeas corpus of constitutional trial errors is more limited than on direct review. If we conclude that the Constitution has been violated at trial, we will grant habeas corpus relief only if the petitioner can establish actual prejudice, that is, that the error had a substantial and injurious influence on the jury's verdict. Brecht v. Abrahamson, 113 S.Ct. 1710, 1722 (1993).

Turning to this case, we affirm the District Court's rulings on the described testimony with the exception of James Pullins' testimony. Pullins testified to out-of-court statements made by petitioner's co-defendant Griffin that were incriminating of Griffin and petitioner. Griffin did not take the stand at trial. Admissions by a

co-defendant that incriminate the defendant are inadmissible, under the Confrontation Clause, when the co-defendant refuses to take the stand at trial. Bruton v. United States, 389 U.S. 818 (1967). Therefore, petitioner's confrontation rights were violated by Pullins testimony.

We conclude, however, that the errors do not warrant reversal. Petitioner's role in planning the murder was established by the testimony of Terry Wright, petitioner's cell mate, to whom petitioner confessed, and the testimony of James, II, who had personal knowledge of the crime. Griffin's statements to which Pullins testified were isolated and made while she was influenced by drugs, which petitioner established on cross-examination of Pullins. The statements' probative value is therefore minimal compared to the other evidence introduced. We conclude, as did the District Court, that in light of the record Pullins' testimony did not have a

substantial and injurious influence on the jury's verdict.

III.

We find no merit in the remaining issues but we shall discuss them briefly. First, petitioner claims a violation of due process in the exclusion of the testimony of Julie Farmer, which was offered by the prosecution and objected to by Lewis. Farmer would have testified as to inculpatory statements made by Griffin. The evidence was excluded because of the effects of Griffin's drug use at that particular time, as testified to by Farmer. We agree with the state court of appeals and the District Court below that the exclusion of Farmer's testimony did not prejudice petitioner. In fact, it was petitioner who objected to Farmer's testimony at trial.

Second, petitioner argues that he was denied his right to due process and confrontation when the state trial court refused to compel Tex and Kim Zimmerman to

answer certain questions on cross-examination. When petitioner's counsel asked them whether they had been involved in the marijuana operation at the farm, these witnesses invoked their Fifth Amendment right against self-incrimination. The court refused to compel them to answer.

We find no constitutional violation. The witnesses properly invoked their right against self-incrimination. The question then is whether it was error to have permitted their direct testimony given petitioner's inability to cross-examine them concerning their marijuana activities. The right of confrontation does not require exclusion of all statement whenever the declarant is not subject to cross-examination. Out-of-court statements by unavailable witnesses, for example, may be admitted against a defendant when the statements fall into a traditional hearsay exception or are supported by sufficient indicia of reliability. Ohio v. Roberts,

448 U.S. 56, 66 (1980). Extrajudicial statements made by an accomplice that inculpate the defendant are, however, inherently unreliable. See Lee v. Illinois, 476 U.S. 530, 546 (1986); Bruton, 389 U.S. 818.

Several factors distinguish the Zimmerman's testimony from those in which cross-examination is required. The Zimmerman's testimony was given in court so the witnesses were face-to-face with petitioner and the jury could judge the witnesses' demeanor. More importantly, petitioner has failed to articulate why establishing the witnesses' involvement with the marijuana operations was vital to petitioner's defense. Apparently, the state called the Zimmermans in anticipation of a defense by petitioner that Tex Zimmerman had killed James, Sr. Petitioner did not, however, make such a defense. Furthermore, the Zimmermans' involvement in the marijuana operations was amply established by the

testimony of Marilyn Steurer, Pam Neely, and Robin Peabody. We cannot conclude, therefore, that the trial court's refusal to compel the Zimmermans to answer questions about their involvement in the marijuana farm deprived petitioner of due process or his right of confrontation.

Third, petitioner argues that the trial court improperly instructed the jury on the crime of complicity. The court denied petitioner's request for an instruction that the mere presence and consent of petitioner during the commission of the crime does not make him an aider or abettor. The trial court instructed the jury: "Aid means to help, assist, or strengthen. Abet means to encourage, counsel, incite, or assist." This instruction conveyed the substance of the charged crime and therefore petitioner was not deprived of a fundamentally fair trial.

Fourth, petitioner challenges his conviction of aggravated robbery with a

firearm. He was convicted of aggravated murder with an aggravated robbery specification, but was not convicted of possession of a firearm during the murder. He was also convicted of aggravated robbery with a firearm. Petitioner argues that it is inconsistent for the state to prove he committed aggravated robbery with a firearm but fail to prove that he committed aggravated murder with a firearm. We disagree. The jury could reasonably have found that while the state did not prove beyond a reasonable doubt that petitioner pulled the trigger to cause James, Sr.'s murder, he did carry operable weapons to the car in committing the aggravated robbery.

Finally, petitioner challenges his conviction for aggravated murder with an armed robbery specification. First, he argues that the state failed to prove the murder was committed with prior calculation and design. Second, petitioner argues that the state failed to prove that the intent to

rob was present at the time of the murder. As noted above, petitioner's cell mate and James, II testified to petitioner's plan to kill James, Sr. In addition, James, II testified that during their planning sessions, he, Griffin, and petitioner discussed how to kill James, Sr. and take his guns. When James, II and petitioner returned from cremating the body, Griffin already had James, Sr.'s handguns on the bed, and Griffin and petitioner requested that James, II unlock James, Sr.'s gun closet. Viewed in the light most favorable to the government, there was sufficient evidence to support the challenged conviction.

IV.

For the reasons stated above, the District Court's denial of petitioner's request for a writ of habeas corpus is **AFFIRMED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DISTRICT

Carl Steven Lewis,
Petitioner,

vs.

Anthony Brigano, Warden
Respondent.

Case No. C-2-92-625
JUDGE GRAHAM
Magistrate Judge King

OPINION AND ORDER

Petitioner, a state prisoner, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the Court on the petition, petitioner's motion contra response to the state's show cause and request for dismissal (construed as a memorandum in support of the petition), respondent's return of writ, and the exhibits of the parties.

Petitioner also filed, on March 23, 1993, a motion requesting the Court to order

the respondent to provide petitioner with a copy of a transcript of the trial court proceedings. Because the Court does not consider that a transcript is necessary to a resolution of this matter, petitioner's motion is DENIED.[1]

On February 27, 1989, the 1989 term of the Coshocton County Ohio Grand Jury indicted petitioner on six counts of complicity as follows: aggravated murder (Count One), trafficking in marijuana (Count Two), unlawful possession of a dangerous ordnance (Count Three), theft (Count Four), aggravated robbery (Count Five), and gross abuse of a corpse (Count Six). The matter proceeded to trial. With consent of counsel, the trial court dismissed the charge for trafficking in marijuana. The jury found petitioner guilty on all

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[1]Although respondent's return of writ states that a transcript would be filed in this matter, no such transcript is currently before this court.

remaining counts. The trial court sentenced petitioner to incarceration for life on Count One with parole eligibility after serving twenty actual years of incarceration, a term of eight to twenty-five years incarceration on Count Two, a term of three years incarceration on Count Five (the court found that Counts Three and Four were allied offenses with Count Five). and a term of one year incarceration on Count Six. The trial court further ordered that all sentences be served consecutively.

On August 15, 1990, petitioner, represented by counsel, appealed the decision of the trial court to the Court of Appeal for the Fifth District of Ohio, raising the following assignments of error:

1. The trial court committed prejudicial error when it ruled that the declarations made by co-defendant Sandra Griffin to third party witnesses where (sic) admissible evidence.

2. The trial court abused its discretion when it indiscriminately admitted certain declarations against interest while denying the admission of

other such statements.

3. "The essential demands of fairness" as embodied in the due process clause of the Fourteenth Amendment to the United State's Constitution and Article I, Section 10 of the Ohio Constitution were violated when defendant's request to have the trial court compel Tex and Kim Zimmerman to answer questions on cross-examination was denied.

4. The trial erred prejudicially (sic) when it failed to completely and correctly instruct the jury on the crime of complicity.

5. The trial court erred prejudicially when it denied the inclusion of licensed drivers in the jury list utilized to select the venire of this case.

6. The trial court erred when it denied the admission of the results of defendant's voluntarily taken polygraph because the results of such an examination are of such a relevant and probative value that based upon the establishment of a proper foundation they are admissible evidence.

7. The state failed to prove beyond a reasonable doubt the necessary element of prior calculation and design, or the cocommitant (sic) existence of an aggravated robbery.

8. Defendant's conviction of aggravated robbery with firearm specification is contrary to the

law.

9. The trial court erred prejudicially when it refused to instruct the jury on the inferior degree offense of abuse of a corpse.

On February 13, 1991, the Court of Appeals affirmed the judgment of the trial court.

Petitioner, proceeding pro se, sought leave to appeal to the Supreme Court of Ohio. On April 16, 1991, the Ohio Supreme Court denied petitioner's request for an extension of time to file a memorandum in support of jurisdiction. On June 27, 1991, the Ohio Supreme Court sua sponte dismissed the action for failure to prosecute. On December 9, 1991, petitioner filed a delayed memorandum in support of jurisdiction before the Supreme Court of Ohio, asserting the following propositions of law, reprinted verbatim:

1. Did the trial court commit prijudicial error when it ruled that the declarations made by co-defendant Sandra Griffin to a third party were admissible evidence against appellant.

2. Did the trialcourt [sic] abuse its

descretion [sic] wh&n [sic] if allowed some certain declarations against interest then denied at will the admissions of other such statements.

3. Did the trial court commit prejudicial error when it allowed the state's witnesses to take the fifth after direct testimony for the state.

4. Did the trial court commit prejudicial error when it failed to completely and correctly enstruct [sic] the jury of the crime of complicty [sic].

5. Did the trial court commit prejudicial error when it refused to utilize drivers for jury duty in this case once requested.

6. Did the trial court commit prejudicial error when it refused to admit the results of appellant's voluntarily taked [sic] polygraph results.

7. Did the failure of the appellee to prove beyond a reasonable doubt the element of prior calculation and design deprive him of due process of law.

8. Did the appellee's failure to prove that the appellant had possession of a firearm violate due process of law.

9. Did the trial court commit prejudicial error when it refused to instruct the jury on the inferior degree offense of abuse of a corpse.

On January 22, 1992, the Ohio Supreme court granted petitioner's motion for leave to file a delayed appeal. On April 15, 1992, the Supreme Court of Ohio dismissed the action in a memorandum decision for lack of a substantial constitutional question.

On July 21, 1992, petitioner, proceeding pro se, filed the instant petition seeking a writ of habeas corpus, asserting the following grounds for relief:

> Ground One: Court illegally ruled that co-defendant's statements were admissible.
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> Supporting Facts: Prosecutor used several witnesses to establish what the missing co-defendant was supposed to have said concerning the defendant's activities.
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> Ground Two: Court improperly ruled other such statements were not admissible.
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> Ground Three: Court improperly allowed the state's witness to take the fifth, after testifying.
>
> Supporting Facts: The Court granted the witness [sic] fifth Amendnent [sic] right on cross examination to prevent defendant from being able to show bics [sic] through deals and their bad act's [sic].
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> Ground Four: Defendant request that

his mere presence at scene of the [sic]crime did not constitute complicity where such argument [sic] and request was based upon spur of the moment.

Ground Five: The trial court committed prejudicial error when it refused to utilize lecensed [sic] drivers for jury duty in this case once requested.

Ground Six: The State of Ohio failed to prove that the petitioner had possession of firearm.

Ground Seven: The failure of the respondent to prove beyond a reasonable doubt the element of prior calculation and design deprived petitioner of due process of law and a fair trial.

Ground Eight: The State of Ohio failed to prove that the petitioner had possession of a firearm.

Ground Nine: The trial court committed prejudical [sic] error when it refused to instruct the jury on a lesser degree offense of abuse of a corpse.

This Court concludes that petitioner has exhausted available state remedies. Respondent submits that this Court should dismiss all claims for relief for lack of merit. The Court will address each claim for relief in the order set forth in the petition.

James Steurer, Sr., the victim, grew marijuana on his farm near Tunnel Hill in Coshocton County, Ohio. In 1987, Steurer, Sr. met a woman named Sandra Griffin, who was from Cleveland, Tennessee. Steurer, Sr. was introduced to Griffin by his daughter Marilyn Steurer and Marilyn's friend, Robin Peabody. At that time, Griffin was sexually involved with petitioner. Both petitioner and Griffin used marijuana and Griffin also consumed cocaine, xanax, and valium.

In February, 1988, Griffin agreed to come to Ohio and stay with Steurer, Sr., in exchange for one pound of marijuana. Griffin and Steurer, Sr., became sexually involved as a result of this visit.

Thereafter, Griffin came to Coshocton and Steurer travelled to Cleveland, Tennessee. Steurer, Sr. gave money and marijuana to Griffin. Griffin referred to Steurer, Sr., as her "sugar daddy." State v. Lewis, Case No. 90-CA-3, slip op. at 3 (Coshocton Cty. App. Feb. 13, 1991), Return

of Writ, Appendix, Exhibit F. Even as the relationship between Griffin and Steurer, Sr. blossomed, Griffin continued her involvement with petitioner. During this time, petitioner and Griffin sold marijuana in Tennessee that Steurer, Sr. had grown on his farm in Coshocton, Ohio.

In June, 1988, James Steurer, Jr. moved to the Coshocton farm to live with his father, Steurer, Sr. Steurer, Jr. became actively involved in the marijuana operation at the farm. Steurer, Jr. met Griffin at the farm, became friends with Griffin and petitioner, and eventually moved to Tennessee to live with them.

At some point later in 1988, Griffin's relationship with Steurer, Sr. deteriorated. Steurer, Sr. became angry with Griffin of Griffin's drug use, and hit her several times. Griffin responded by telling Steurer, Sr. that she would kill him. About the same time, Griffin and petitioner began to argue over Griffin's relationship

with Steurer, Sr. In November and December 1988, petitioner, Griffin, and James, Jr. began plotting to kill James, Sr.

Steurer, Jr. testified that on January 3, 1989, petitioner, Griffin, and Steurer, Jr. left Cleveland, Tennessee bound for Coshocton, Ohio. (Tr. at 2294). In the early morning hours of January 4, 1989, they arrived at the farm of Steurer, Sr. (Tr. at 2294-95). Steurer, Sr. was sleeping when they arrived, and the three decided that they would also go to sleep.

When then awoke, petitioner and Steurer, Jr. found Steurer, Sr. in a barn feeding animals and talked to him about going deer hunting. (Tr. at 2297). As Steurer, Sr. began walking back to the house, Steurer, Jr. testified, petitioner shot Steurer, Sr. in the back of the head. (Tr. at 2298). Steurer, Jr. and petitioner then loaded the body of Steurer, Sr. on a tractor. They drove into the woods, laid the body on the ground, put kindling wood on

top of the body, and lit the fire.

Petitioner and Steurer, Jr. returned to the house and, along with Griffin, loaded a number of weapons that belonged to Steurer, Sr. in their car. The threesome then drove back to Tennessee, where they buried some weapons and sold others. Petitioner and Griffin threw the murder weapon, a .357 Smith and Wesson magnum, over a bridge. Cleveland, Tennessee police later recovered the gun along the bank of a creek.

The day after the killing, several hunters came upon the burned area. They say a rib cage which was still smoldering, but assumed it was part of an animal. Later in January, the Coshocton, County, Ohio Sheriff was notified of the disappearance of Steurer, Sr. At the burn site, the sheriff's department recovered Steurer Sr.'s skull, which showed signs of an injury by a blunt instrument. The [sic] also found vertebrae, part of his left arm and left leg, teeth, and buttons. Steel toes from a

pair of shoes were found pointed up, as if a body had been laying there. Dental records identified the body as James Steurer, Sr. (Tr. at 1661-72, 2387).

Ground One: Admissibility of Co-Defendants Statements

Petitioner asserts that the trial court improperly admitted statements made by a co-defendant, Sandra Griffin. Griffin invoked her Fifth Amendment right against self-incrimination, making herself unavailable as a witness under Ohio Evid. R. 804 (A). Petitioner asserts that the admission of testimony of statements attributed to co-defendant Griffin was error. In a brief before the Court of Appeals, petitioner set for the name of four witnesses and their relevant testimony which allegedly prejudiced petitioner. Brief of Defendant-Appellant at 8-24, Return of Writ, Appendix, Exhibit D.

Janice Steurer, daughter-in-law of the victim, testified to overhearing an argument between Griffin and the victim. Id. at 8.

The Court of Appeals held that the testimony was admissible to show the state of mind of Griffin, and was not hearsay. State v. Lewis, Case No. 90-CA-3, slip op. at 7 (Coshocton Cty. App. Feb 13, 1991), Return of Writ, Appendix, Exhibit F. Steurer further testified to an impression that "things were not going real well between" Griffin and the victim. Because Steurer was merely providing a personal observation, not testifying to any statement made by Griffin, the Court of Appeals held that the testimony was admissible. Id.

Robin Peabody, an acquaintance of Griffin testified that Griffin told Peabody that Griffin was upset with the victim for taking away Griffin's pills. Brief of Defendant-Appellant at 9, Return of Writ, Appendix, Exhibit D. The Court of Appeals held that the testimony of Peabody was admissible to show Griffin's state of mind and was not hearsay. State v. Lewis, Case No. 90-CA-3, slip op. at 7 (Coshocton Cty.

App.), Return of Writ , Appendix, Exhibit F.

Tracy Bruce, a friend of Griffin's from Cleveland, testified to seeing the victim strike Griffin twice. Brief of Defendant-Appellant at 9, Return of Writ, Appendix, Exhibit D.

James Pullins testified, over objections by defense counsel, that on January 1, 1989, Griffin stated that she herself, petitioner, Steve Lewis, and James Steurer, Jr. were going to "take care" of her "sugar daddy." Brief of Defendant-Appellant, at 11, Return of Writ, Appendix, Exhibit D. Pullins further testified that on January 8 or 9, 1989, Griffin stated that she, petitioner, and James Steurer, Jr. had shot Griffin's "sugar daddy." Brief of Defendant-Appellant at 11, Return of Writ, Appendix, Exhibit D.

Before the Court of Appeals, petitioner argued that the testimony of Tracy Bruce and James Pullins were not admissible as statements against interests pursuant to

Ohio R. Evid. 803(B)(3) because Griffin's large consumption of drugs made Griffin's statement's untrustworthy. Id. at 16-23. Petitioner asserted that voir dire examination established that Griffin was under the influence of drugs when making these statements in the presence of Bruce and Pullins. Id. at 9, 12. The Court of Appeals held that the trial court did not abuse its discretion in admitting this testimony. State v. Lewis, slip op. at 8 (Coshocton Cty. App.), Return of Writ, Appendix, Exhibit F.

Federal habeas review of state court evidentiary rulings is extremely limited. Waters v. Kassulke, 916 F.2d 329, 335 (6th Cir. 1990). Evidentiary questions generally do not rise to a constitutional level unless the error was so prejudicial as to deprive a defendant of a fundamentally fair trial, thereby violating due process. Cooper v. Sowders, 837 F.2d 284, 286 (6th Cir. 1988); see also Walker v. Engle, 703 D.2d 959, 962

(6th Cir. 1983), cert. denied 464 U.S. 962 (1983). When such errors are alleged, the federal court's inquiry in reviewing these claims is directed to whether the evidence was rationally connected to the crime charged. Carter v. Jago, 637 F.2d 449 (6th Cir. 1980), cert. denied 456 F.2d 980 (1982).

The statements of Janice Steurer and Peabody were not so prejudicial as to deprive petitioner of a fundamentally fair trial. Steurer's testimony as to her personal observations does not fall within even a broad definition of hearsay, and petitioner has failed to provide the Court with any other grounds on which to examine the constitutionally [sic] of this testimony. The rest of the challenged testimony of both Janice Steurer and Peabody shows Griffin's state of mind, and is, therefore, rationally connected to the crimes charged. See Carter v. Jago, 637 F.2d 449. The Court concludes that the

testimony of Steurer and Peabody did not deprive petitioner of his constitutional rights.

The Court will next consider Griffin's out of court statement, testified to by Pullins, that Griffin, Steurer, Jr. and petitioner had shot Griffin's "sugar daddy." Brief of Defendant-Appellant at 11, Return of Writ, Appendix, Exhibit D. The Sixth Amendment provides that, "In all criminal prosecutions, the accused shall enjoy the right. . .to be confronted with the witnesses against him." The confrontation clause has been made applicable to the states under the due process clause of the Fourteenth Amendment. Harrington v. California, 395 U.S. 250 (1969); Smith v. Illinois, 390 F.2d 129 (1968). The right of cross-examination is included in the right of an accused in criminal cases to confront the witnesses against him. Pointer v. Texas, 380 F.2d 400, 405 (1965).

Bruton v. United States, 391 U. S. 123

(1968), involved a join trial in which a co-defendant allegedly confessed to a postal inspector that he and the habeas petitioner had committed a robbery. The Court held that the admission in a joint trial of the confession of a non-testifying co-defendant violates the accused's Sixth Amendment right of confrontation. Bruton v. United States, supra. The reason for this rule is that there is substantial risk that the jury, despite the instructions from the trial court to the contrary, will look to the incriminating extrajudicial statements in determining petitioner's guilt. Bruton, 391 U.S. at 126. The confrontation clause can be violated when a co-defendant's out-of-court hearsay statement is admitted into evidence without the declarant's being available at trial for a "full and effective" cross-examination. Roberts v. Russell, 392 U.S. 293 (1968).

In Dutton v. Evans, 400 U.S. 74 (1970), the Supreme Court addressed facts similar to

those set forth in the instant action. Evans, Truett, and Williams were charged with the murder of three police officers in Georgia. Id. at 76. Truett was granted immunity from prosecution in return for his testimony. Id. Evans and Williams were indicted by a Grand Jury. Id. Evans exercised his right under Georgia law to be tried separately. Id. At Evan's trial, Truett was the principal prosecution witness and provided detailed testimony of the circumstances of the murder. Id. at 77. Shaw, a prisoner who had been incarcerated with Williams at the time that Williams was being arraigned for the murder charge, was another witness for the prosecution. Id. Shaw testified that he asked Williams at the time of Williams' arraignment, "How did you make out in court?" and that Williams has responded, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." Id.

In his habeas petition, Evans asserted

that the admission of this statement violated his right to confront witnesses against him because Williams refused to testify at Evan's trial. Id. at 79. The Court held that Evans was not deprived of his right of confrontation because Evans could, and vigorously and effectively did, cross-examine Shaw regarding whether Shaw actually heard the statement purportedly uttered by Evan's co-conspirator, Williams. Id. at 87-89. The Court also relied upon four factors regarding Williams' alleged out-of-court statement which the Court considered "indicia of reliability . . . widely viewed as determinative of whether a statement may be placed before the jury though there is not confrontation of the declarant." Id. at 88-89. First, Williams' statement contained no express assertion about past fact, carrying on its face a warning to the jury against giving the statement undue weight. Id. at 88. Second, Williams' personal knowledge of the identity

and role of the other participants in the murders was abundantly established by Truett's testimony and by Williams' prior conviction. Id. "Third, the possibility that Williams' statement was founded on faulty recollection is remote in the extreme." Id. at 89. "Fourth, the circumstances under which Williams made the statement were such as to give reason to suppose that Williams did not misrepresent Evan's involvement in crime. . . . His statement was spontaneous, and it was against his penal interest to make it." Id. at 89.

The same factors apply to Griffin's out-of-court declarations against Lewis. Steurer, Jr. was present at the scene, providing detailed testimony of the murder, and was subject to vigorous cross-examination by petitioner's counsel. Pullins' testimony of petitioner's co-conspirator's alleged confession was of peripheral significance because the

declaration implicated all three conspirators and was cumulative of Steurer, Jr.'s testimony. Griffin's personal knowledge was established by Steurer Jr.'s testimony. It is inconceivable that cross-examination could have shown that Griffin was not in a position to know whether or not petitioner was involved in the murder. Griffin's statement was spontaneous and it was against her penal interest to make it. Griffin had no apparent reason to lie to Pullins. There is a possibility that Griffin's statement was founded on faulty recollection because of consumption of drugs, including xanax and valium. However, petitioner had an opportunity to fully cross-examine Pullins with regard to Griffin's conduct, coherence, and actions when she made the statement. See State v. Lewis, Case No. 90-CA-3, slip op. at 8 (Coshocton Cty. App. Feb. 13, 1991). The Court holds that Griffin's out-of-court declarations did not deprive petitioner of

his right to confront witnesses against him.

The rest of the testimony of Pullins and the testimony of Bruce challenged by petitioner did not deprive petitioner of a fundamentally fair trial. Petitioner had an opportunity to cross-examine the witnesses concerning the extent of Griffin's drug use and its effect on her behavior. State v. Lewis, Case No. 90-CA-3, slip op. at 8 (Coshocton Cty. App. Feb. 13, 1991), Return of Writ, Appendix, Exhibit F. Moreover, Terry Wright, petitioner's cell-mate, and James Steurer, Jr. testified to the roles of petitioner and Griffin in the crime. Id. Therefore, the cumulative testimony of Bruce and Pullins did not prejudice petitioner. The Court concludes that the testimony of Bruce and Pullins was rationally connected to the crime charged and did not violate petitioner's rights under the Constitution. Accordingly, the first ground for relief is without merit.

Ground Two: Arbitrary exclusion of testimony

Petitioner asserts that the trial court improperly ruled that other similar statements were inadmissible. Petitioner apparently asserts that if the testimony of Steurer, Jr., Peabody, Bruce, and Pullins was inadmissible, then the testimony of Julie Farmer was also inadmissible.

Before the Court of Appeals, petitioner argued that the testimony of Farmer contained a statement against Griffin's interest. Brief of Defendant-Appellant at 10, Return of Writ, Appendix, Exhibit D. Petitioner argued that the trial court abused its discretion by excluding Farmer's testimony but declaring other statements against interest admissible. Id. at 25.

The Court of Appeals held against petitioner because the exclusion of Farmer's testimony did not prejudice petitioner. State v. Lewis, slip op. at 8-9, Return of Writ, Appendix, Exhibit F. In fact, petitioner objected to Farmer's testimony at trial. Petitioner has otherwise failed to

establish prejudice from the exclusion of Farmer's testimony.

Because the exclusion of the testimony was not prejudicial, the Court concludes that petitioner was not deprived of a fundamentally fair trial in violation of his constitutional rights.

Ground Three: Invocation of right against self-incrimination on cross-examination

Petitioner argued on appeal that the trial court improperly allowed Tex and Kim Zimmerman to invoke their Fifth Amendment privilege against self-incrimination when they were subject to cross-examination by defense counsel. Petitioner had attempted to cross-examine the Zimmermans regarding involvement in a marijuana operation. Petitioner first argued, in the interest of petitioner's due process, that the trial court should have granted the witnesses not-statutory immunity. Brief of Defendant-Appellant at 30, Return of Writ, Appendix, Exhibit D. The Court of Appeals held that Ohio law does not provide not statutory

immunity. State v. Lewis, slip op. at 9 (Coshocton Cty. App.), Return of Writ, Appendix, Exhibit F.

Petitioner further argued deprivation of rights pursuant to the confrontation clause of the Sixth Amendment. Brief of Defendant-Appellant at 33-34, Return of Writ, Appendix, Exhibit D. In support of this proposition, petitioner cited Douglas v. Alabama, 380 U.S. 415 (1965). In Douglas, the Supreme Court held that "the defendant's inability to cross-examine [the accomplice] as to the alleged confession because the accomplice claimed the fifth amendment plainly denied the defendant the right of cross-examination secured by the confrontation clause." Douglas, at 419.

However, the instant circumstances are clearly distinguishable. The holding in Douglas "was premised on the basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by

inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." Lee v. Illinois, 476, U.S. 530, 541 (1986), overruled on other grounds in Bourjaily v. United States, 483 U.S. 171 (1987). In contrast, the Zimmermans did not have anything to gain by testifying against petitioner. Rather, the Zimmermans invoked the fifth amendment privilege because they did not want to admit to a crime separate and apart from the crime for which the petitioner was being tried. Nothing prevented petitioner from cross-examining the Zimmermans on those crimes at issue in the trial.

Therefore, the Zimmermans' invocation of the fifth amendment right against self-incrimination in response to questions concerning the Zimmermans' involvement in a marijuana operation did not deprive petitioner of a fundamentally fair trial.

Ground Four: Failure to properly instruct on complicity

Petitioner asserts that the trial court should have instructed the jury that mere presence at the scene of a crime does not constitute complicity. Errors in jury instructions are generally not cognizable in federal habeas corpus unless they deprive petitioner of a fundamentally fair trial. Henderson v. Kibbe, 431 U.S. 145, 154 (1977); see also Wood v. Marshall, 790 F.2d 548, 551-52 (6th Cir. 1986), cert. denied 479 U.S. 1036 (1987); Thomas v. Arn, 704 F.2d 865, 868-69 (6th Cir. 1983). A habeas petitioner challenging jury instructions must establish that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process" Cupp v. Naughten, 414 U.S. 141, 147 (1973). An omission or an incomplete instruction is less likely to be prejudicial than a misstatement of law. Henderson, 431 U.S. at 155.

Petitioner asserts that the trial court omitted a jury instruction, not that the

trial court misstated the law. The trial court instructed the jury on the meaning of "aid" and "abet." State v. Lewis, slip op. at 10 (Coshocton Cty. App.), Return of Writ, Appendix, Exhibit F. The Court of Appeals held that this instruction conveyed the substance of the requested charge. Id. Upon review, the Court concludes that the trial court's instruction on the meaning of "aid" and "abet" conveyed the substance of petitioner's request that mere presence at the scene of the crime is not sufficient to justify a finding of guilty. Petitioner has failed to establish that the Constitution requires any further instruction to the jury. Therefore, the failure of the trial court to give the requested instruction did not deny petitioner a fundamentally fair trial.

Petitioner's fourth claim for relief lacks merit.

Ground Five: Licensed drivers for jury duty

Petitioner asserts that the trial court

committed prejudicial error by refusing to utilize licensed drivers for jury duty as requested by petitioner. However, petitioner has failed to cite any case law establishing the proposition that the Constitution requires the inclusion of licensed drivers for jury duty.

Petitioner argued before the Court of Appeals that the U.S. Constitution does not forbid a state from prescribing relevant qualifications for jurors and confining the selection to citizens who meet specific criteria. Brief of Defendant-Appellant at 38 (citing Carter v. Green County, 396 U.S. 320 (1970)), Return of Writ, Appendix, Exhibit D. Petitioner further cited Ohio Rev. Code § 2313.06 which permits the inclusion of qualified drivers licensees in the computation of jury lists. Id. However, petitioner has failed to demonstrate that the Constitution requires juries to consist of members who hold drivers licenses. Furthermore, petitioner

has utterly failed to demonstrate prejudice. Therefore, the trial court's failure to grant petitioner's request to utilize a list of licensed drivers for jury duty did not deprive petitioner of a fundamentally fair trial. Petitioner's fifth claim is without merit.

Ground Six: Failure to prove possession of a firearm

A federal habeas corpus court must consider whether there was sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S.307, 319 (1979). To determine whether the evidence was sufficient to support a conviction as a matter of due process, this Court must consider evidence in the light most favorable to the prosecution. Wright v. West, 112 S.Ct. 2482 (1992) (citing Jackson, at 319). The prosecution is not affirmatively required to "rule out every hypothesis except that of guilt." Id. (quoting Jackson, at 326). "[A] reviewing

court 'faced with a record of historical facts that supports conflicting inferences must presume - even if it does not affirmatively appear in the record - that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" Id. (quoting Jackson, at 326).

Petitioner asserts that because the state failed to prove that petitioner had possession of a firearm, the jury could not have found petitioner guilty of aggravated murder with an aggravated robbery specification without violating petitioner's right to due process. Brief of Defendant-Appellant at 49, Return of Writ, Appendix, Exhibit D. The Court of Appeals held that the trier of fact could reasonably have found that petitioner carried the operable weapon for committing the aggravating robbery but did not pull the trigger to commit the murder. State v. Lewis, slip op. at 12-13 (Coshocton Cty. App.), Return of

Writ, Appendix, Exhibit F. Viewing the evidence in the light most favorable to the prosecution, the Court concludes that the jury could have found beyond a reasonable doubt that petitioner had possession of a firearm. Petitioner's sixth ground for relief is therefore without merit.

Ground Seven: Failure to prove prior calculation and design

Petitioner asserts that the state failed to prove the element of prior calculation and design beyond a reasonable doubt. Brief of Defendant-Appellant at 44, Return of Writ, Appendix, Exhibit D. Based upon the testimony of three witnesses, the Court of Appeals held, the jury had sufficient evidence upon which to find that petitioner possessed the requisite intent of prior calculation and design. State v. Lewis, slip op. at 11-12 (Coshocton Cty. App.), Return of Writ, Appendix, Exhibit F.

Terry Wright, petitioner's cell-mate, testified that petitioner told him of petitioner's plan to take over the victim's

business. Id. at 11. James Pullins testified that Griffin, a co-defendant, told Pullins that Griffin, petitioner, and the victim's son, James Steurer, Jr., were going to Ohio to "do her sugar daddy in." Id. at 12. Griffin referred to the victim as her "sugar daddy." Id. at 3. James Steurer, Jr. testified that in the two months preceding the murder, he himself, Griffin, and petitioner had a dozed conversations to plan the murder. Id. at 12.

Viewing the evidence in the light most favorable to the prosecution, the Court concludes that the jury had sufficient evidence to find prior calculation and design beyond a reasonable doubt. Petitioner's seventh ground for relief is, therefore, without merit.

Ground Eight: Failure to prove possession of a firearm

Petitioner asserted the same ground for relief in ground six. Petitioner's eighth ground for relief is, therefore, without merit.

Ground Nine: Failure to instruct on a lesser included offense

Petitioner asserts that the trial court should have instructed the jury on abuse of a corpse, a lesser included offense of gross abuse of a corpse. Errors in jury instructions are generally not cognizable in federal habeas corpus unless they deprive petitioner of a fundamentally fair trial. Henderson v. Kibbe, 431 U.S. 145, 154 (1977); see also Wood v. Marshall, 790 F.2d 548, 551-52 (6th Cir. 1986), cert. denied 479 U.S. 1036 (1987); Thomas v. Arn, 704 F.2d 865, 868-69 (6th Cir. 1983). Although the Fifth Amendment does not guarantee to a criminal defendant the right to have the jury instructed on a lesser included offense, to preclude such an instruction would raise difficult constitutional questions. Keeble v. U.S., 412 U.S. 205, 212-13 (1973). Nearly universal acceptance of the lesser included offense rule in both state and federal courts establishes the value of the rule to the defendant as

procedural safeguard. Beck v. Alabama, 447 U.S. 625, 637 (1980). "[I]t has long been 'beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find the defendant guilty of the lesser included offense and acquit the defendant of the greater.'" Beck, at 636 (citing Keeble v. U.S., 412 U.S. 205, 208 (1973)). A lesser included offense charge can be beneficial to the defendant by affording the jury a less drastic alternative than the choice between the conviction charged and acquittal. Beck, at 633. Providing the jury with a "third option" of convicting on a lesser included offense insures that the jury will accord the defendant the full benefit of the reasonable doubt standard. Keeble, at 208.

Count Six of the indictment charged petitioner with complicity in commission of gross abuse of a corpse pursuant to Ohio Rev. Code § 2927.01(B). Indictment at 3,

Return of Writ, Appendix, Exhibit A. Petitioner requested a jury instruction on the crime of abuse of a corpse pursuant to Ohio Rev. Code § 2907.01(A). Ohio Rev. Code 2927.01 provides:

> (A) No person, except as authorized by law, shall treat a human corpse in a way that he knows would outrage reasonable family sensibilities.
>
> (B) No person, except as authorized by law, shall threat [sic] a human corpse in a way that would outrage reasonable community sensibilities.
>
> (C) Whoever violated division (A) of this section is guilty of abuse of a corpse, a misdemeanor of the second degree. Whoever violates division (B) of this section is guilty of gross abuse of a corpse, a felony of the fourth degree.

In order to be a lesser included offense in Ohio, the offense must contain one or more mitigating elements, not present in the greater offense. State v. Deem, 40 Ohio St. 3d 205 (syllabus) (1980). The Court of Appeals held that the legislature intended to create two different crimes, depending whether the treatment of the corpse violates "community" or "family" sensibilities.

States v. Lewis, slip op. at 13 (Coshocton Cty. App.), Return of Writ, Appendix, Exhibit F. The Court of Appeals further held that "'family' is not a mitigating element of 'community'; it is a different element." Id. Petitioner asserts that because "family" is a smaller unit that "community," abuse of a corpse is, in fact, a lesser included offense of gross abuse of a corpse. See Memorandum in Support of Petition at 19.

A federal court may review a state prisoner's habeas petition only on the grounds that the challenged confinement is in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a). A federal court may not issue a writ of habeas corpus "on the basis of a perceived error of state law." Pulley v. Harris, 465 U.S. 37, 41 (1984); Smith v. Sowders, 848 F.2d 735, 738 (6th Cir.), cert. denied 488 U.S. 866 (1988). A federal habeas court does not function as an

additional state appellate court reviewing state courts' decisions on state law or procedure. Allen v. Morris, 845 F.2d 610, 614 (6th Cir. 1988).

Petitioner challenges the state appellate court's interpretation of state law, not federal constitutional law. If the state courts or legislature had determined abuse of a corpse to be a lesser included offense of gross abuse of a corpse, then the trial court would have been obligated to give an appropriate instruction. However, this federal habeas court is bound by the determination of the state appellate court that, under Ohio law, abuse of a corpse is not a lesser included offense of gross abuse of a corpse. Therefore, the trial court did not commit prejudicial error by refusing to instruct the jury on the offense of abuse of a corpse.

Petitioner's ninth ground for relief is without merit.

For the foregoing reasons, the instant

petition is **DENIED** and this action is hereby **DISMISSED**.

_____

James L. Graham
United States District Judge

No. 93-3659

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARL STEVEN LEWIS, Petitioner-Appellant,	)	
	)	**ORDER**
v.	)	
	)	
ANTHONY BRIGANO, Respondent-Appellee.	)	

BEFORE: KENNEDY, JONES, AND SUHRHEINRICH, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and

decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

Supreme Court, U.S.
FILED
NOV 10 1994
OFFICE OF THE CLERK

CASE NO. 94-330

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1994

CARL STEVEN LEWIS,
Petitioner,
vs.
ANTHONY BRIGANO, WARDEN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT

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CASE NO. 94-330

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

CARL STEVEN LEWIS,

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vs.

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS AND JUDGMENTS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, entered April 8, 1994, is unreported, and is reproduced at Petitioner's Appendix 1. *Carl Lewis Stevens vs. Anthony Brigano, Warden*, Case No. 93-3659. The opinion and order of the United States District Court for the Southern District of Ohio, Eastern Division, entered May 19, 1993, is unreported, and is reproduced at Petitioner's Appendix 2. *Carl Lewis Stevens vs. Anthony Brigano, Warden*, Case No. C-2-92-625. The order of the Sixth Circuit denying rehearing en banc, entered May 25, 1994, is unreported and reproduced in Petitioner's Appendix 3.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 8, 1994. Thereafter, the Petitioner filed a suggestion of rehearing en banc. This was denied on May 25, 1994. According to Petitioner's certificate of service, the petition for writ of certiorari was filed on August 22, 1994. Since a suggestion of rehearing en banc does not toll the ninety-day period in which a petition for writ of certiorari must be filed, then the Petitioner is out of rule, and this Court lacks jurisdiction. Supreme Court Rule 13.4. In addition, the Petitioner invokes this Court's jurisdiction for issuing extraordinary writs, Rule 20.1, rather than the certiorari rules.

CONSTITUTIONAL PROVISION INVOLVED

The Respondent concurs with the Petitioner's statement of the Constitutional provision involved in this case. Supreme Court Rules 15.2 and 24.2.

STATEMENT OF THE CASE

The Respondent concurs with the Petitioner's statement of the case. Supreme Court Rules 15.2 and 24.2.

REASONS FOR DENYING THE WRIT

ARGUMENT

I. CERTIORARI SHOULD BE DENIED BECAUSE THE PETITION WAS FILED OUT OF TIME UNDER SUPREME COURT RULE 13.

The Petitioner, Carl Steven Lewis (hereinafter Lewis), notes in his Petition for a Writ of Certiorari that the merit decision of the United States Court of Appeals for the Sixth Circuit was rendered on April 8, 1994. (Petition, at p. 2; Petition, at Appendix 1). He then states that a petition for rehearing was denied on May 25, 1994. (*Id.*; and Appendix 3). The certiorari Petition was filed on August 22.

A reading of Appendix 3 of the Petition shows that this pleading in the Circuit Court was, in actuality, a "*suggestion* for rehearing en banc, *** "; also referred to therein as a "petition." (Appendix 3, at p. 1, emphasis added). The pleading served upon the Respondent was entitled "Suggestion to Rehear Case En Banc." This title corresponds to the description of the pleading found in Petitioner's Appendix 3. Lewis, in his Statement of the Case herein, also notes that the pleading was a "petition for rehearing en banc." (Petition, at p. 9).

Rule 13.4, Rules of the Supreme Court of the United States, sets forth in relevant part as follows:

> [I]f a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties *** runs from the date of the denial of the petition for rehearing or the entry of a subsequent

> judgment. A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.

Rule 13.1 requires that a petition be filed within ninety (90) days of the entry of judgment. Rule 13.6 allows for an extension of time to be granted. The Respondent is not aware of any extension being granted by this Court. Rule 13.4 indicates that a request for a rehearing en banc does not act as an extension. The decision of the Sixth Circuit was rendered on April 8. The last day for filing a petition for a writ of certiorari, therefore, was July 7, 1994. Lewis filed his Petition on August 22, more than six weeks after his time had expired.

Lewis filed his Petition seeking a writ of certiorari within ninety days of the denial of his suggestion for a rehearing en banc by the United States Court of Appeals. However, this filing was more than ninety days after the entry of the judgment by that court. A suggestion or petition for rehearing en banc (or in banc) does not toll the filing period. Therefore, the Petitioner is out of rule, and the Respondent respectfully suggests that this honorable Court is without jurisdiction to hear this Petition.

II. CERTIORARI SHOULD BE DENIED BECAUSE THE PETITIONER HAS FAILED TO IDENTIFY AN ACTUAL CONFLICT BETWEEN THE CIRCUITS ON THE ISSUE OF WHETHER A FEDERAL HABEAS CORPUS COURT CAN ANALYZE A CONSTITUTIONAL ERROR FOR HARMLESS ERROR UNDER THE

BRECHT STANDARD EVEN WHEN THE STATE COURTS DID NOT REVIEW FOR HARM BECAUSE THEY FOUND NO ERROR.

Lewis' initial argument in his Petition for a Writ of Certiorari is that the United States Sixth Circuit should have been foreclosed from utilizing the "actual prejudice" standard set forth in *Brecht v. Abrahamson*, ___ U.S. ___, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Therein, this Court set forth "a less onerous standard on habeas review of constitutional error." 113 S.Ct. at 1722. This was the test found in *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed.2d 1557 (1946), rather than the test outlined in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In *Chapman*, this Court held "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24. The State bore the burden of proof under *Chapman*. *Brecht*, 113 S.Ct. at 1717.

This standard should "be applied retroactively to all who are similarly situated." *Teague v. Lane*, 489 U.S. 288, 300, 109 S.Ct 1060, 1069, 103 L.Ed.2d 334 (1989); *Henry v. Estelle*, 993 F.3d 1423, 1427 n.2 (9th Cir. 1993).

This Court expressly held "that collateral review is different from direct review ***." *Brecht*, 113 S.Ct. at 1719. "Federal courts are not forums in which to relitigate state trials." *Id., quoting Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 3392, 77 L.Ed.2d 1090 (1983). "An error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Brecht*, 113 S.Ct. at 1720, *quoting United States v. Frady*, 456 U.S. 152, 165, 102 S.Ct. 1584, 1593, 71 L.Ed.2d 816

(1982), *and United States v. Addonizio*, 442 U.S. 178, 184, 99 S.Ct. 2235, 2239, 60 L.Ed.2d 805 (1979).

It is clear that this Court sees federal habeas corpus review of state criminal convictions as essentially different from direct review of the convictions by the state courts themselves. An error that a direct review court finds sufficient to overturn a conviction will not always be enough to obtain the same result in federal habeas corpus. The standard of review in federal habeas corpus is not the same as in the state appellate courts. *Brecht*, 113 S.Ct. at 1720. The "actual prejudice" rule set forth in *Brecht* and *Kotteakos* is without doubt the rule to be applied in federal collateral review of constitutional error occurring in a state conviction. This is precisely what the United States Sixth Circuit did in the Petitioner's case below.

The Respondent can find nothing in the *Brecht* decision requiring that the level of harmless error review be altered depending upon whether or not the state courts found error and engaged in a *Chapman* analysis.

Lewis cites *Orndorff v. Lockhart*, 998 F.2d 1426 (8th Cir. 1993), in support of his argument that the *Chapman* standard should be used if the state court has found no error below. However, the facts of that case do not conform to the argument. The constitutional error in that case involved the prosecutor having the victim hypnotized prior to trial, and not telling the defense about it. 998 F.2d at 1429. The defense did not discover this until after they had appealed to the state supreme court. *Id.* Therefore, the habeas petitioner therein did not have a chance to present this issue to the state courts. *Id.* It was presented for the first time in the federal courts:

> In the case before us, however, the state courts did not have the opportunity to review the error at all, and the federal habeas court was the first court to review the constitutional error under the *Chapman* harmless error standard. As a result, we find that rule announced in *Brecht* does not apply and that the *Chapman* harmless error standard is the appropriate test in this case.

998 F.2d at 1430.[1] In another case from that Circuit, cited by Lewis, the court avoids deciding the issue because, under either the *Brecht* or the *Chapman* standards, the error would not have been found to be harmless. *Hoversten v. State of Iowa*, 998 F.2d 614, 617 (8th Cir. 1993). A later case in the Eighth Circuit refers to *Orndorff* in opining that *Chapman* should be used if the state courts did have the opportunity to review an issue, but the state courts did not use a harmless error analysis of either type because they found no error. *Starr v. Lockhart*, 23 F.3d 1280, 1292 (8th Cir. 1994).

Clearly, *Orndorff* is inapplicable to the Petitioner's case, due to its fact pattern; and *Hoversten* declined to decide the matter at all. The Respondent, furthermore, believes that *Starr* incorrectly analyzes the law, and that the case is distinguishable as well.

Starr appears to hold, as the Petitioner now appears to argue, that if a state court has reviewed an issue, but has found no error, and therefore has not done a harmless error analysis, then this failing somehow converts a federal habeas corpus court from a court of collateral review, capable only of granting an "extraordinary remedy," into one of direct criminal review. *Brecht* quite expressly holds that a habeas

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[1]This Court denied certiorari in *Orndorff*, there being no conflict between the Circuits.

corpus court is not a direct review court, and that is exactly the reason why federal habeas review must use the "less onerous standard" found in *Kotteakos*. *Brecht*, 113 S.Ct. at 1719, 1722. The role of federal habeas courts "is secondary and limited." *Id.*, at 1719, *quoting Barefoot v. Estelle*, 463 U.S. at 887.

The fact that a state court may have reached a decision which differs from that which the federal collateral court thinks should have been reached, does not convert that federal habeas forum into a direct review court with powers greater than those normally afforded for collateral review. There is nothing in *Brecht* which can give rise to this transformation. *Brecht* clearly set forth the harmless error analysis which must be used in collateral habeas corpus review, and listed no exceptions. The United States Court of Appeals for the Sixth Circuit used that required standard in their review of Lewis' case below. Therefore, no reason exists to overrule that decision.[2]

Starr does not demonstrate a conflict between the Circuits. First, *Starr* found denial of effective assistance of counsel, which is a structural error, and not subject to the harmless error analysis. 23 F.3d at 1286. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674

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[2]This Court should note that it granted certiorari in a case where one of the issues was essentially the same as the one in the instant argument. The petitioner in that case cited the *Orndorff* case as well. However, this Court granted certiorari only as to Question 2 therein, and not the matter of whether the state courts must utilize the *Chapman* standard before a habeas court can use *Brecht*, since there was no conflict between the circuits on that issue. *O'Neal v. McAninch*, ___ U.S. ___, 114 S.Ct. 1396, 128 L.Ed.2d 70 (1994) (Case No. 93-7407).

This Court also should note that Lewis has not raised the issue of the burden of proof, as in *O'Neal*. This means that the instant case lacks yet another reason for this Court to grant review.

(1984). Second, the *Starr* court found, with regard to the denial of a court-appointed expert, that "the error would not be harmless even were we applying the less stringent *Brecht* standard of review." 23 F.3d at 1293. Therefore, the *Starr* court reached the same ultimate conclusion as *Hoversten*. Since *Hoversten* presented no conflict due to this conclusion, then neither does *Starr*.

III. IT WAS PROPER IN THIS CASE FOR THE FEDERAL REVIEWING COURTS TO REVIEW A STATE CASE FOR CONSTITUTIONAL ERROR UPON THE RECORD AVAILABLE AND WITHOUT CONDUCTING AN EVIDENTIARY HEARING.

IV. THE COURT OF APPEALS CORRECTLY ANALYZED THE ALLEGED CONFRONTATIONAL CLAUSE ERROR AS HARMLESS UNDER THE BRECHT STANDARD OF SUBSTANTIAL AND INJURIOUS EFFECT.

Finally, in his Petition, Lewis raises two issues which are case specific, and which therefore do not present issues of constitutional weight worthy of this Court's review.

The substance of Lewis' second issue before this Court (the third argument herein) is that the United States District Court and the Sixth Circuit were without sufficient evidence with which to review the alleged confrontation error, without a copy of the transcript, and without holding an evidentiary hearing. The United States Sixth Circuit lists the issues appealed to that court from the District Court. (Petitioner's

Appendix 1, at pp. 7-8). The issue of expanding the record does not appear to be one of them. The Suggestion to Rehear Case En Banc does not rely on that argument either. This appears to be the first time the matter has been listed as a ground for relief or an issue for review, and, at this point, this Court should consider the matter to be waived for the purpose of review.

Certainly there is no evidence that an evidentiary hearing was necessary in this case. With regard to the transcript: in Ohio, the Respondent would not be in possession of that document, and would have to request it from the local authorities. In Lewis' case, the transcript was very large, and the county that was to provide it was a small rural county. The Respondent filed a return of writ, and informed the District Court therein that the transcript was large, and would have to be filed later. The court decided that a transcript was not necessary, and proceeded to review the case without waiting for one to be filed. The District Court stated in its Opinion and Order that "the Court does not consider that a transcript is necessary to a resolution of this matter *** ." (Petitioner's Appendix 2, at p. 2). Thereafter, the District Court decided the issues on the record before it, already filed by the Respondent. The Sixth Circuit stated no need to expand that record either.

In any event, the Sixth Circuit reached the correct decision, with a sufficient amount of evidence at hand.

Lewis had complained of more than one violation of the Confrontation Clause. In reviewing the District Court's decision, the Sixth Circuit found as follows:

> Turning to this case, we affirm the District Court's rulings on the described testimony with the exception of James Pullins' testimony. Pullins

> testified to out-of-court statements made by petitioner's co-defendant Griffin that were incriminating of Griffin and petitioner. Griffin did not take the stand at trial. Admissions by a co-defendant that incriminate the defendant are inadmissible, under the Confrontation Clause, when the co-defendant refuses to take the stand at trial.

(Petitioner's Appendix 1, at pp. 11-12). The court cites *Bruton v. United States*, 389 U.S. 818, 88 S.Ct. 126, 19 L.Ed.2d 70 (1967). Thereafter, the court analyzed the alleged error pursuant to *Brecht, supra,* and concluded that Lewis had failed to establish actual prejudice:

> We conclude, however, that the errors do not warrant reversal. Petitioner's role in planning the murder was established by the testimony of Terry Wright, petitioner's cell mate, to whom petitioner confessed, and the testimony of James, II, who had personal knowledge of the crime. Griffin's statements to which Pullins testified were isolated and made while she was influenced by drugs, which petitioner established on cross-examination of Pullins. The statements' probative value is therefore minimal compared to the other evidence introduced.

(Petitioner's Appendix 1, at p. 12). The District Court analyzed the same allegation of error with regard to Pullins, and found that there was none. (Petitioner's Appendix 2, at pp. 18-24). The District Court relied upon the "indicia of reliability" test set forth in *Dutton v. Evans*, 400 U.S. 74, 88-89, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), to determine that there was no violation of the Confrontation Clause. (Petitioner's Appendix 2, at pp. 21-24). This is the same conclusion reached by the state courts as well. The Sixth

Circuit merely took the same facts, and interpreted them differently to reach a different conclusion.

Assuming, *arguendo*, that there was a Confrontation Clause error in Lewis's case, in order to prevail under *Brecht*, he must establish actual prejudice -- he must show that the error had a substantial and injurious influence on the jury's verdict. *Brecht*, 113 S.Ct. at 1722. The wording of *Brecht* clearly indicates that the test therein is meant to be more difficult for a habeas petitioner to meet than the prior standard. As shown by the Sixth Circuit quotation set forth above, and the District Court's analysis, Lewis failed to meet this standard.

> In his Petition before this Court, Lewis contends that the out-of-court statement made by co-defendant, Sandra Griffin, was the essential evidence in the case against the Petitioner because it served as the glue to bind inconsistent testimony from the other witnesses. *** The remaining testimony regarding Petitioner's role consists of inconsistent testimony originating from two witnesses whose motives for testifying and truthfulness are seriously questionable. As a result co-defendant's statements were the Government's crucial evidence for conviction.

(Petition for Certiorari, at p. 25).

The District Court noted that Pullins' testimony "was cumulative of Steurer Jr.'s testimony." (Petitioner's Appendix 2, at p. 23). The District Court relied upon the facts as set forth in the Ohio appellate court's decision. (*See* Petitioner's Appendix 2, at p. 23). The Sixth Circuit, as quoted *supra*, found that other testimony had established Lewis's role in the crime, that the out-of-court statements

were isolated, and that Lewis had an opportunity to cross-examine Pullins, during which he set forth on the record that the out-of-court declarant had been under the influence of drugs. (Petitioner's Appendix 1, at p. 12). The record before the Sixth Circuit would have included the decision of the Ohio appellate court.

Findings of fact made by states courts are entitled to a presumption of correctness by a United States District Court in a habeas corpus action. 28 U.S.C §2254 (d); *Marshall v. Lonberger*, 459 U.S. 422, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983); *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), *reaff'd*, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982). While the presumption of correctness does not apply to conclusions of law made by the state courts, it does apply to the findings of fact that underlie those conclusions. *Sumner v. Mata*, 455 U.S. at 597. The presumption of correctness applies to findings of a state appellate court as well. *Marshall v. Lonberger*, 459 U.S. at 435.

The District Court and the Sixth Circuit had in their possession the relevant record of the state court procedures in Lewis' habeas corpus action, although the District Court, at least, did not have the transcript. However, the facts as set forth in the Ohio appellate case were sufficient to decide the action, as the District Court expressly stated in its opinion. Since Lewis quoted extensively from the transcript in the Sixth Circuit, it is apparent that he possessed a copy of the transcript. However, neither the District Court nor the Sixth Circuit expressed a need for it, and Lewis may or may not have supplied the Sixth Circuit with it.

Lewis now is asking this Court to reverse the decision of the United States Court of Appeals on the basis of a reweighing of the evidence or a re-examination of the facts.

The Ohio courts found no error. The District Court found no error. The Sixth Circuit, examining the same facts, found error, but determined that it was not of sufficient weight to have had "a substantial and injurious influence on the jury's verdict." (Petitioner's Appendix 1, at p. 11). Therefore, Lewis was unable to establish actual prejudice. (*Id.*)

The issues of whether there was a sufficient record before the appellate court, and whether the court properly applied the law to the facts, are case specific issues, and are not constitutional questions, and therefore do not merit the granting of a writ of certiorari.

CONCLUSION

Lewis failed to file his Petition for a Writ of Certiorari within the prescribed period of time, since he presented a suggestion for rehearing en banc to the United States Court of Appeals for the Sixth Circuit after that court had made its decision, and such a suggestion does not toll the time period for filing a certiorari petition. He then filed his Petition within ninety (90) days of the denial of the suggestion for rehearing en banc. Therefore, this honorable Court should reject the Petition due to lack of jurisdiction, since Lewis should have filed the Petition within ninety days of the original Sixth Circuit decision.

Federal habeas corpus review is essentially different from direct review of a state criminal conviction. *Brecht* sets forth the standard a habeas petitioner must meet to obtain relief if a constitutional error in the state conviction has been found by the federal court: the petitioner bears the burden of showing actual prejudice. He must demonstrate that the error had a substantial and injurious influence on the jury's verdict. This is the standard correctly applied to Lewis' case by the United States Court of Appeals for the Sixth Circuit, below. Lewis has failed to demonstrate a conflict between the Circuits, because each of the cases can be distinguished by its fact pattern, or the specifics of its holding, as not being in direct conflict with the holding of the Sixth Circuit. The federal habeas corpus courts below decided that no transcript was necessary in this case, and decided the issues on the basis of the remainder of the record. Based upon that record, which is entitled to a presumption of correctness, the Sixth Circuit correctly held that there was other evidence supporting Lewis' conviction, that the out-of-court statements were isolated, and that Lewis had the opportunity for cross-examination of the in-court witness, during which he put before the jury the fact that the out-of-court declarant had

been under the influence of drugs. Therefore, the Sixth Circuit properly held that Lewis had not proven actual prejudice by showing that the error had a substantial and injurious influence on the jury's verdict. In any event, the second and third issues listed by Lewis in his Petition are case specific, and do not present constitutional issues requiring the granting of certiorari by this Court.

Therefore, the Respondent urges this honorable Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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